No. 71-[illegible]

In the Supreme Court of the United States

October Term, 1971

JOHN McGEATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his Hobbs Act, tax evasion and false return convictions on the grounds that hearsay evidence was improperly admitted against him and that the government should not have been permitted to try him upon an amended indictment that corrected the official title of the state agency by which he was employed.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of three violations of the Hobbs Act, 18 U.S.C. 1951, five counts of income tax evasion, in violation of 26 U.S.C. 7201, and five counts of filing false income tax returns, in violation of 26 U.S.C. 7206. The trial court sentenced him to concurrent sentences of a year and a day on the three Hobbs Act convictions and a fine of $5,000

with respect to the other charges, and assessed him with costs of prosecution amounting to $8,662.75 (Pet. App. 2a). The court of appeals unanimously affirmed (Pet. App. 1a-9a).

The evidence showed that from the mid-1950's until his retirement in 1974, petitioner was the Park Maintenance Supervisor of the Long Island State Park Commission, a New York State agency (Pet. App. 2a). As part of his official duties, petitioner awarded contracts to tow truck operators to remove disabled cars from the Southern State Parkway. The indictment charged petitioner with extorting illegal payments from tow truck operators in return for parkway towing contracts (Pet. App. 3a). Since petitioner did not report the proceeds of his extortions on his tax returns, he was also charged with tax evasion and filing fraudulent returns (Pet. App. 3a).

1. Petitioner contends (Pet. 12-17) that testimony of one of the witnesses should have been excluded as hearsay. The witness in question, LaGuardia, one of the tow truck operators allegedly victimized by petitioner in an extortion scheme, testified before the grand jury that he had no knowledge of that scheme. Later he was indicted for perjury. At trial, LaGuardia testified that he had made extortion payments and admitted that he had perjured himself before the grand jury. On cross-examination, petitioner sought to show that LaGuardia's testimony was recently fabricated in order to gain leniency in his perjury prosecution (Pet. App. 8a). In rebuttal, the government called Foley, who had managed a gas station on the Southern State Parkway, but whose employment had been terminated (Tr. 865-870). In 1972, subsequent to that termination, Foley and LaGuardia became friends, and on one occasion Foley told LaGuardia that he, Foley, was anxious to return to employment on the Parkway. LaGuardia replied, according to Foley, that he would

arrange a dinner with petitioner to "work something out," but that it would probably cost Foley $10,000 to resume his employment as manager of a gas station on the Parkway, and the payment had to be made to petitioner. The meeting never took place (Tr. 868-869).

The court of appeals correctly held (Pet. App. 9a) that this "testimony was admissible under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement offered to rebut a charge of recent fabrication." Since the defense had attempted to show that LaGuardia had a motive to lie and had therefore falsely implicated petitioner, Foley's testimony was properly received to show that *before* his agreement with the government LaGuardia had implicated petitioner in connection with highway payoffs. See *United States* v. *Lombardi*, 550 F. 2d 827, 828-829 (C.A. 2); *United States* v. *Zito*, 467 F. 2d 1401, 1404 (C.A. 2); *United States* v. *Dorfman*, 470 F. 2d 246, 248 (C.A. 2); *United States* v. *DiLorenzo*, 429 F. 2d 216, 220 (C.A. 2), certiorari denied, 402 U.S. 950; *United States* v. *Grunewald*, 233 F. 2d 556, 566 (C.A. 2), reversed on other grounds, 353 U.S. 391.

Petitioner seeks (Pet. 14-15) to distinguish *Lombardi* and *Zito* on the ground that the rebuttal evidence in those cases related directly to the transactions that were the subject of the prosecution witness's testimony at trial. Petitioner claims that the government must first lay such a "foundation" (Pet. 15) before prior consistent statements of this kind become admissible. But there is no such requirement, and petitioner cites no authority in support of his contention. While prior consistent statements will ordinarily relate directly to the same transaction, the only requirements are those contained in Rule 801(d)(1)(B), which provides that a prior consistent statement is not excludable under the hearsay rule if the

declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive" (Pet. App. 14a-15a). As the court of appeals held (Pet. App. 8a-9a), the requirements of Rule 801(d)(1)(B) were unquestionably met in this case. Moreover, petitioner did not suffer any harm from this evidence, as he was acquitted on the count involving LaGuardia (Pet. App. 9a).

2. Petitioner also argues (Pet. 18-23) that the grand jury's amendment of the indictment, at the government's request, denied him the right to be tried upon the original indictment, deprived him of a fair trial, and violated the Double Jeopardy Clause.

The pertinent facts are as follows: After the jury was empanelled at trial and both sides had made opening statements, petitioner moved to dismiss the indictment because of an error in the name of the Commission that had employed him. The court then adjourned the trial and the government immediately reconvened the grand jury, which amended the indictment to show the correct official name of the Commission. The trial was then resumed (Pet. App. 4a). The only difference between the original and amended indictments was that in the original indictment, petitioner's employer was alleged to be the Long Island State Parks and Recreation Commission, while the amended indictment referred to the Long Island State Park Commission, the name to which the agency had been changed in September 1972 (Pet. App. 4a).

As the court of appeals correctly pointed out, "[t]here is no dispute that [petitioner's] duties and authority were the same before and after the change in official titles" (Pet. App. 4a). Since the change in the indictment was plainly

only formal, it would not have been error for the district judge to amend the indictment without grand jury action. *United States* v. *Cirami*, 510 F. 2d 69 (C.A. 2), certiorari denied, 421 U.S. 964; *Heisler* v. *United States*, 394 F. 2d 692 (C.A. 9), certiorari denied, 393 U.S. 986; *Dye* v. *Sacks*, 279 F. 2d 834 (C.A. 6); *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97; *United States* v. *Denny*, 165 F. 2d 668 (C.A. 7), certiorari denied, 333 U.S. 844. It follows that there was no error in seeking and obtaining an amendment by the grand jury.

Finally, petitioner urges (Pet. 21-23) that the amendment of the indictment after the empanelling of the jury violated the Double Jeopardy Clause. There was in this case only one trial of petitioner, and therefore there can be no valid double jeopardy claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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